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IN THE

Supreme Court of the United States

No. 365.

October Term, 1945.

SEAS SHIPPING COMPANY, INC., *Petitioner,*

v.

JOSEPH SIERACKI, *Respondent.*

PETITION FOR REHEARING ON BEHALF OF SEAS SHIPPING COMPANY, INC.

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To the Honorable, the Justices of the Supreme Court of the United States:

Seas Shipping Company, Inc., respectfully prays for a rehearing and reconsideration of the opinion of this Court which was handed down on April 22, 1946. The opinion of the Court was written by Mr. Justice Rutledge. A dissenting opinion was written by the late Mr. Chief Justice Stone. Mr. Justice Frankfurter and Mr. Justice Burton concurred in the dissent.

The case is of the utmost importance in the Maritime Law. The brief on behalf of the Respondent was served upon counsel for Petitioner on December 27, 1945 and filed with this Court on December 31, 1945. The case was listed for argument on January 2, 1946 and was reached for argument on January 3rd. It is obvious that there was not sufficient time between the date of the oral argument and the date the Respondent's brief was filed for counsel for the Petitioner to prepare, print and file a reply brief. For that reason, the only opportunity that the Petitioner had to

answer the argument made in the brief on behalf of the Respondent was at the oral argument before this Court. Mr. Justice Reed did not sit at the oral argument. He did not, therefore, hear the Petitioner's answers to the arguments made on behalf of the Respondent. Mr. Justice Reed apparently voted with four other Justices to affirm the judgment of the Circuit Court of Appeals. It is possible that if Mr. Justice Reed had heard the Petitioner's answers to the contentions on behalf of the Respondent in the case, as set forth in his brief, he might have been persuaded to join with the three dissenting Justices in the case and it would have been necessary either to affirm the decision of the Circuit Court of Appeals because of an equally divided Court, or to have listed the case for reargument after the return of Mr. Justice Jackson to the Court.

Your Petitioner earnestly requests a rehearing of the case for other reasons. Petitioner is of the belief that the major premise upon which the majority opinion is based is erroneous. We refer to the first sentence in the third paragraph on page 3 of the opinion of the Court, where the following appears:

> "There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the Stevedoring Company."

Near the bottom of the same page the following appears:

> "Respondent is equally insistent that the owner cannot slough off liability to those who do the vessel's work by bringing an intermediate contracting employer between himself and those workers."

Except for the fact that we admit that the Court properly summarizes the contentions of the Respondent, those statements are not correct. If Mr. Sieracki had been employed by the Petitioner as a stevedore, there is not an iota of doubt but that the Petitioner's liability for his injuries would have been exclusively that provided by the

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, et seq. Under such circumstances, Mr. Sieracki could not have maintained an action either at law or in Admiralty against his employer by reason of the unseaworthiness of his employer's vessel. Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, Section 905 of 33 U. S. C. A., is quite specific on this point:

> "The liability of an employer prescribed in Section 904 of this chapter *shall be exclusive and in place of all other liabilities of such employer to the employee*—". (Emphasis ours.)

The respondent was a longshoreman or stevedore. He was not the master or a member of the crew of the Steamship "Robin Sherwood". Those two classes of persons are the only ones who are excluded from the provisions of the Longshoremen's and Harbor Workers' Compensation Act, Section 2 of the Act, 33 U. S. C. A. 902, subsection 3, provides:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net."

The same section provides, subsection 4:

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

It is freely admitted by your Petitioner that if Mr. Sieracki had been a member of the crew of the vessel, he could have availed himself of the doctrine of unseaworthiness. He was not so engaged. He was a stevedore or longshoreman and whether he had been employed by an independent stevedoring contractor or the shipowner, his rights would be governed by the Longshoremen's and Harbor

Workers' Compensation Act in any claim he might make against his employer.

The opinion of the Court recognizes the applicability of the Longshoremen's and Harbor Workers' Compensation Act had the respondent been employed by the shipowner. In the first full paragraph on page 12 of the opinion, the following appears:

> "The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner."

We shall discuss hereinafter whether or not the presumption referred to in the quoted sentence from the opinion is correct. Suffice it to say at this time that the Petitioner never argued that the passage of the Longshoremen's and Harbor Workers' Compensation Act took away from a stevedore or longshoreman his rights against a third party tort feasor who was not his employer. The sole argument that the Petitioner sought to make with respect to the Longshoremen's and Harbor Workers' Compensation Act was that its passage created a line of demarcation between the old and the new. It cut off any remedy by a stevedore against his employer under the Jones Act, Merchant Marine Act of 1920, 46 U. S. C. A. 688, which had been enunciated by this Court in *International Stevedoring Co. v. Haverty*, 272 U. S. 50; 47 S. Ct. 19. It also constituted an express recognition by Congress of a difference between the two, based solely upon the nature of the employment. It is not our intention to reiterate here the arguments made in our brief. We believe that they are clearly enunciated in the dissenting opinion in this case.

We trust that our analysis has made it clear that it is, in our opinion, incorrect to say, as this Court says in the second paragraph on page 10 of the opinion:

> "It (obligation of owner to provide a seaworthy vessel) is one he cannot delegate. By the same token it

is one he cannot contract away as to any workman within the scope of its policy."

The shipowner, we have here shown, can contract away the obligation this Court would impose upon him by the decision in this case. He can do so merely by engaging in the stevedoring business and making the stevedores his employees. The operation of an Act of Congress does the rest. It limits his obligation for unseaworthiness and for his negligence to the payments of compensation provided under the Act.

Earlier in this petition we stated that the decision of the Court in this case was of the utmost importance in the Maritime Law. Just how important it is can be gleaned from a consideration of the maritime field as it exists today. Cargo ships are, roughly speaking, divided into two classes: tankers and dry cargo vessels. Tank vessels form a large percentage of the total tonnage of merchant vessels.[1] They are, in the vast majority of cases, owned and operated, in peacetime, by oil companies. Stevedores, as that name is properly used and generally understood in practice, do not engage in loading or discharging a tanker. Any work of this nature is performed by shore employees of the oil companies. Since these men are employed by the same company which owns and operates the ship, any remedy they might have for an injury sustained by reason of the unseaworthiness of their employer's vessel would be under the Longshoremen's and Harbor Workers' Compensation Act.

It is true that, during the recent war, most stevedoring work was done by independent local contractors and not by stevedores in the employ of a shipowner. That is not, however, standard peacetime practice in all cases. Counsel for Petitioner has no means of accurately ascertaining, within the time available, what proportion of steamship companies perform or performed their own stevedoring work,

1. Peacetime figures, furnished by the American Merchant Marine Institute, show the net tonnage of American flag tankers was 2,127,276 and the net tonnage of dry cargo vessels 2,170,724.

either directly or through the device of a subsidiary corporation. A review of some of the reported cases indicates that at least some shipowners do. The following reported cases involve stevedores employed by steamship companies:

Bull Insular Line, Inc., et al. v. Schwartz, Deputy Commissioner, et al., 23 F. Supp. 359;

Puget Sound Freight Lines, et al. v. Marshall, Deputy Commissioner, et al., 125 F. (2) 876;

Pacific Employers Insurance Company and Bay Transport Company v. Pillsbury, Deputy Commissioner, 130 F. (2) 21;

Smrekar, Jr., etc. v. Bay and River Navigation Company, et al., 160 F. (2) 85, Certiorari denied January 2, 1946, 66 S. Ct. 338.

There are undoubtedly others. To the personal knowledge of counsel for the Petitioner, at least one large steamship company conducted stevedoring operations and had a stevedoring division within the same corporation which owned and operated its ships.[2] At least one other had and possibly still has a subsidiary corporation which does stevedoring work for its vessels.[3] Very probably there are others because the knowledge of counsel for Petitioner is limited and confined exclusively to the Port of Philadelphia.

The independent stevedoring contractor obtained his business from the smaller steamship lines, which were not large enough to maintain an independent stevedoring division or subsidiary corporation. One can understand a shipowner being willing to assume liability for injury to someone which is the result of his negligence. Negligence is, after all, something that he can guard against. A latent defect is something that cannot be guarded against. It is liability without fault. The end result of the doctrine enunciated by this Court in its opinion in the case at bar will

2. Moore-McCormack Lines, Inc.

3. Nacirema Operating Company (Nacirema is American spelled backwards) is a subsidiary of America-Hawaiian Steamship Company.

be that if a great number of claims are made against shipowners under it, the shipowner will protect himself by going into the stevedoring business and hiring the stevedores directly to perform the services on his vessel. To such men his liability will be limited by the applicable compensation statute, *Swanson v. Marra Bros., Inc.*, decided April 22, 1946. The Longshoremen's and Harbor Workers' Compensation Act will be the measure of his liability to such employees whether caused by negligence or not.

The independent stevedoring contractor, such as Sieracki's employer in the case at bar, will not be able to survive economically under such a system. The costs of compensation insurance are a part of the costs of doing business of the contracting stevedore and are passed along to his customer, the shipowner, so that the net result will be that the large steamship company will be able to make a profit, which now is made by the contracting stevedore, upon his stevedoring operations as well as upon his business as a carrier by water. The large companies will become larger. The small will not survive.

The ones who will be hurt most by the new doctrine enunciated by the decision in the case at bar will be the small shipowner and the contracting stevedore. We venture to say that in smaller ports, where steamship companies do not operate frequently, the independent stevedore will survive but that he will be unable to do so in such large ports as New York, San Francisco, New Orleans and Philadelphia.

There will thus grow up in the maritime field a situation where a stevedore will have one set of remedies when he works for one employer and another set when he works for another employer, or that the stevedore in New York will have remedies different from a stevedore in a smaller port. We submit that the result is neither desirable nor in keeping with the traditional policy of uniformity in the Maritime Law which this Court has always held to be an essential feature of it. *Garrett v. Moore-McCormack Co., Inc.*, 317 U. S. 239, and cases there cited in footnote 10.

At the oral argument we attempted to answer the Respondent's argument with respect to the historical background of the stevedore. We pointed out that the ancient *Consulato del Mare,* which is at least as old as the laws of Wisby and Oleron, referred specifically to a person who worked to stow or discharge the cargoes of ships. His name in the original Catalan is "stibador", the original, no doubt, of the word we use. Maclachlan on Merchant Shipping, 7th edition, page 336 (note). The argument that historically the work now done by stevedores was formerly done by members of the crew falls in the face of such positive evidence. The three cases cited in the majority opinion at the bottom of page 7 and the top of page 8 to support the historical argument, concern the question of a stevedore's lien and whether or not his contract for services is maritime. The statements concerning the historical background of the stevedore are not buttressed in those cases by authorities and we submit that the historical argument falls when it so clearly appears that the stevedore has, from the earliest times, been distinguished from the member of the crew who serves as a seaman.

The decisions of this Court in *South Chicago Coal and Dock Co., et al. v. Bassett,* 309 U. S. 251 and *Norton v. Warner Co.,* 321 U. S. 565, are clear recognitions by this Court of the fact that the mere presence of a person upon a vessel performing services connected with the vessel is not a separate and distinct ground for a new rule of liability. See also *Smrekar, Jr. v. Bay River Navigation Company,* supra, in which case this Court denied certiorari the day before the oral argument in the case at bar.

In our brief to this Court we argued that the doctrine of unseaworthiness was so peculiar to the Admiralty that it should only be enforceable there. This contention was dismissed very briefly in the opinion of the Court. We wish to point out that the cases cited as controlling that portion of the opinion, with one exception, involve liability under a statute and not under the general Maritime Law. We

respectfully submit that without the benefit of a statute enabling him so to do, a member of the crew of a vessel who relies entirely upon unseaworthiness for recovery is restricted to an action in Admiralty. As is said by Mr. Justice Douglas in writing the unanimous opinion of the Court in *Norton v. Warner Co.*, supra, at 570:

> "Moreover, seamen may sue under the Jones Act for injuries in the course of their employment. And in such actions, assumption of risk is no defense. Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424. *Or suit may be brought in Admiralty for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment.* Mahnich v. Southern Steamship Company, 321 U. S. 96, and cases cited. These are basic rights." (Emphasis ours.)

In conclusion, it is respectfully submitted that this case is a proper one for rehearing. It is understood that, under ordinary circumstances, where the Court is equally divided the judgment below is affirmed. In this case, the Circuit Court of Appeals did not have before it the full argument on the question which, it developed, was to be the deciding one in the case. The briefs of both counsel before the Circuit Court of Appeals were directed mainly to the question of negligence and not to whether a stevedore might come within the scope of the warranty of seaworthiness. The Circuit Court of Appeals stated that its decision extended the doctrine beyond its then existing limits. The change in the personnel of this Court since the decision adds difficulty to the problem of granting a rehearing. This difficulty should not persuade the Court to stand by a decision which raises problems so far beyond the confines of the particular case. The absence of Mr. Justice Reed at the time of the oral argument before this Court may have been an important factor in determining the final decision. The matter is so important and such a novel doctrine in the Maritime Law that it should not be finally determined by a narrow margin

under such unusual circumstances. It is respectfully submitted that the question of enlarging the scope of the doctrine of seaworthiness, benevolent on the one hand and harsh on the other, is properly a matter for investigation and determination by Congress. No one case presents a sufficiently broad view of the entire situation to enable the Court to see the whole picture in its proper perspective. It is requested that this Court again consider the brief submitted on behalf of the Petitioner in the light of what has been said in the dissenting opinion and in this Petition for Rehearing and that this Court grant the Petition and permit rehearing and reargument.

Respectfully submitted,

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I hereby certify that the within Petition for Rehearing is filed in good faith and not for purposes of delay.

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